NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted May 19, 2023
Decided May 26, 2023

Before

DIANE P. WOOD, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-1460

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DARRELL CATHEY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:20-CR-00062(1)

Manish S. Shah,
Judge.

O R D E R

Darrell Cathey pleaded guilty to possessing a firearm as a felon and possessing with intent to distribute cocaine base and 3,4-Methylenedioxymethamphetamine (MDMA). He appeals, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw. See *Anders v. California*, 386 U.S. 738 (1967). We notified Cathey of the motion, see CIR. R. 51(b), and he did not respond. Counsel's brief explains the nature of the case and addresses the issues that an appeal of this kind would be expected to involve; because counsel's analysis appears thorough, we limit our review to the subjects she raises. See *United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

Chicago police officers heard gunshots coming from a gangway between two buildings, then saw Cathey emerge. Cathey, who was armed with a pistol in his waistband, saw the officers and fled. The officers pursued, and Cathey ran up a building's exterior staircase and threw the pistol onto a nearby roof. The officers caught up to him, searched him, and found a bag with .3 grams of MDMA and 3.8 grams of cocaine base. They also recovered the pistol, which was warm and unloaded.

Cathey—who knew that he had multiple prior felony convictions—was charged with possessing a firearm as a felon, 18 U.S.C. § 922(g)(1), and possessing with intent to distribute MDMA and cocaine base, 21 U.S.C. § 841(a)(1). He decided two weeks before trial (the day before the final pretrial conference) to plead guilty to both charges. He filed a detailed plea declaration that provided a factual basis for his guilty pleas. At the change-of-plea hearing, the district court conducted a colloquy under Rule 11 of the Federal Rules of Criminal Procedure, during which Cathey stated under oath that he had received no promises in return for his guilty pleas. The court accepted Cathey's plea and ordered the preparation of a presentence investigation report (PSR).

The PSR's calculation of Cathey's offense level under the Sentencing Guidelines drew objections from both parties. The probation officer selected a base offense level of 20 because Cathey had a prior felony drug conviction. U.S.S.G. § 2K2.1(a)(4)(A). The government argued for a base offense level of 24 because Cathey also had a prior conviction for a violent felony in Illinois: aggravated battery for striking a police officer. *Id.* § 2K2.1(a)(2); 720 ILCS 5/12-3.05(d)(4). In support, the government cited the four-count information from the Illinois case. The government also objected to any reduction for acceptance of responsibility, U.S.S.G. § 3E1.1(a)–(b), because Cathey pleaded guilty so close to trial. Cathey, meanwhile, objected to a two-level increase under U.S.S.G. § 3C1.2 for recklessly creating a substantial risk of death or serious bodily injury in the course of fleeing from a law enforcement officer. The probation officer suggested that increase because Cathey had thrown the pistol away during the foot chase. See *id.*

In its sentencing memorandum, the government argued for a sentence within the PSR's guidelines range (92 to 115 months' imprisonment), pointing to Cathey's criminal history and contending that firing the gun made this offense particularly dangerous. Cathey responded that a below-guidelines sentence was warranted given his disadvantaged background, future prospects, and difficult pretrial detention in a county jail during the COVID-19 pandemic.

At the sentencing hearing, the district court first ruled that the base offense level was 24 because Cathey's aggravated-battery conviction was for a violent felony. In

Illinois, battery can be committed by causing bodily harm (violent) or making insulting or provoking contact (nonviolent). See *United States v. Lynn*, 851 F.3d 786, 796–97 (7th Cir. 2017); 720 ILCS 5/12-3(a). The court applied the modified categorical approach, examined the charging document, and found that the count of conviction (Count 2) charged Cathey with violent battery. See *Lynn*, 851 F.3d at 796–97 (citing *Mathis v. United States*, 579 U.S. 500, 505–06 (2016)).

Next, the court calculated the total offense level as 26. First, the court applied a four-level increase because Cathey had admitted to possessing the gun in connection with another felony, the drug offense. U.S.S.G. § 2K2.1(b)(6)(B). Next, the court ruled that reckless-endangerment enhancement did not apply. Finally, the court subtracted two levels for acceptance of responsibility, *id.* § 3E1.1(a), but the government refused to move for the further one-level reduction, *id.* § 3E1.1(b). With Cathey's undisputed criminal-history category (VI), the guidelines range was 120 to 150 months' imprisonment.

After hearing from both parties, the court discussed the sentencing factors of 18 U.S.C. § 3553(a) and sentenced Cathey to 108 months' imprisonment. The court first concluded that Cathey had fired the gun, noting that it was emptied and warm when recovered. Although there was no known target for the 12 shots, the court explained that firing them was "terribly dangerous" and made "this kind of gun possession as serious as it gets." Next, the court recognized that although Cathey had a history of dealing drugs and possessing guns illegally, he grew up "witnessing violence in a disadvantaged neighborhood" and committing crimes was "an easier path to take." The court also said that Cathey could change, pointing to his marketable skills and the support of his family and friends. And Cathey would be deterred from committing future crimes, given the difficulty of being incarcerated during the pandemic.

The court also sentenced Cathey to three years' supervised release. The court adopted the PSR's calculation of the policy-statement range: one to three years for the firearm offense (a Class C felony), 18 U.S.C. §§ 924(a)(8), 3559(a)(3), and three years for the drug offense (a Class C felony with a statutory minimum of three years), 21 U.S.C. § 841(b)(1)(C); 18 U.S.C. 3559(a)(3); U.S.S.G. § 5D1.2(a)(2), (c). The court also adopted the conditions of supervised release proposed in the PSR, save one, then confirmed that Cathey had reviewed them with his lawyer. Cathey stated that he did not object to any.

Counsel first informs us that Cathey insists that the government coerced his guilty pleas by promising him a 77-month sentence. Because that assertion implicates the validity of the plea, counsel properly considers arguing that Cathey should be

allowed to withdraw it. See *United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012) (counsel may refrain from discussing guilty plea only if, after consultation, defendant does not want to withdraw it). Cathey did not move to withdraw his plea in the district court, and so our review would be only for plain error. See *United States v. Davenport*, 719 F.3d 616, 618 (7th Cir. 2013).

Counsel correctly concludes that challenging the guilty plea would be frivolous. At the change-of-plea hearing, the district court substantially complied with the requirements of Federal Rule of Criminal Procedure 11 and ensured that Cathey's pleas were knowing and voluntary. *Id.* Moreover, at that hearing Cathey denied receiving any promises in return for his pleas. That sworn statement is presumed true, and Cathey would need to provide a "compelling explanation" for contradicting it on appeal. See *Thompson v. United States*, 732 F.3d 826, 829–30 (7th Cir. 2013). We see none here.

Counsel also correctly concludes that Cathey could not plausibly challenge his sentence on procedural grounds. The court began with the Guidelines, considered the 18 U.S.C. § 3553(a) factors, and explained the sentence. See *Gall v. United States*, 552 U.S. 38, 49–50 (2007). And challenging the court's correct calculation of the guidelines range would be frivolous. *Id.* Counsel points out that, for purposes of setting the base offense level, the court used only the charging document to find that Cathey had been convicted of the violent form of battery, though that multicount information does not show which is the count of conviction. See *Shepard v. United States*, 544 U.S. 13, 21, 26 (2005) (permissible documents are "conclusive records made or used in adjudicating guilt"). But Cathey did not object to the court's reliance on the information (or argue that he was convicted of offensive contact), so we would review only for plain error affecting his substantial rights. FED. R. CRIM. P. 52(b). And there was no prejudice here because the finding was correct: The commitment order in the battery case (supplied by counsel on appeal) shows that Cathey was indeed convicted of the violent form of battery.

The rest of the guidelines calculations were also correct. Cathey admitted to possessing the gun in connection with the drug offense, so the four-level increase was proper. Because Cathey pleaded guilty shortly before trial, the government was within its rights to refuse to move for the one-level acceptance-of-responsibility reduction. See *United States v. Davis*, 714 F.3d 474, 475 (7th Cir. 2013) ("The prosecutor may withhold such a motion for any reason that does not violate the Constitution."). And Cathey's undisputed criminal-history category was appropriately based on his prior

convictions and his possession of the gun and drugs while on parole for a state conviction. U.S.S.G. § 4A1.1(a)–(d).

Next, counsel is correct that Cathey could not plausibly argue that his prison sentence is substantively unreasonable. See *Gall*, 552 U.S. at 51. We would presume that the below-guidelines sentence is not unreasonably high. See *United States v. Dewitt*, 943 F.3d 1092, 1098 (7th Cir. 2019). And, like counsel, we see nothing in the record to rebut that presumption: The court thoroughly justified the sentence under the § 3553(a) factors by weighing Cathey's extensive criminal history and the dangerousness of his firing the gun in a residential area against his difficult upbringing, promising personal characteristics, and strong support system; the court also discussed the added difficulty of incarceration under pandemic-related restrictions.

Counsel next considers, and appropriately rejects, a challenge to the supervised-release term or conditions. The three-year term does not exceed the statutory maximum and would be presumed reasonable because it is within the correctly calculated range. See *United States. v. Jones*, 774 F.3d 399, 404 (7th Cir. 2014). And the court's thorough explanation for the overall sentence justified the term of supervised release. See *United States v. Bickart*, 825 F.3d 832, 839 (7th Cir. 2016). Further, Cathey expressly waived any challenge to the conditions. See *United States v. Smith*, 906 F.3d 645, 650 (7th Cir. 2018).

Finally, counsel says that Cathey would like to argue that his trial lawyer was ineffective. As counsel explains, Cathey should raise his ineffective-assistance claim on collateral review, where he can develop a record to support the claim. See *United States v. Cates*, 950 F.3d 453, 456–57 (7th Cir. 2020).

We therefore GRANT the motion to withdraw and DISMISS the appeal.